

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KEVIN CAMPBELL,

11 v. Petitioner,

CASE NO. C18-0274-JCC

12 UNITED STATES OF AMERICA,
13 Respondent.

14

ORDER

15 This matter comes before the Court on Petitioner Kevin Campbell's motion to vacate, set
16 aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Dkt. No. 14). Having thoroughly
17 considered the parties' briefing and the relevant record, the Court hereby DENIES the motion for
18 the reasons explained herein.

19 **I. BACKGROUND**

20 In February 2017, Petitioner pled guilty to one count of distribution of controlled
21 substances. *United States v. Campbell*, CR17-0025-JCC, Dkt. No. 9 (W.D. Wash. 2017). As part
22 of his plea agreement, Petitioner admitted that he sold drugs through the website Silk Road to
23 dozens of clients, including J.M. *Id.* at 5. Petitioner admitted this included the sale of China
24 White heroin, which he sold to J.M. in 2013. *Id.* Petitioner also admitted that J.M. presumably
25 ingested the drugs that Petitioner sold him, and subsequently died of a drug overdose. *Id.* at 5–6.
26 As part of his plea agreement, Petitioner agreed to waive all rights to directly appeal the sentence

1 imposed by the Court, including any fine, restitution order, probation or supervised release
2 condition, or forfeiture order. *Id.* at 11–12. The waiver includes any right to bring a collateral
3 attack against the conviction and sentence that he received, except as it may relate to ineffective
4 assistance of counsel. *Id.*

5 In August 2017, the Court sentenced Petitioner to 72 months in prison. *Campbell*, CR17-
6 0025-JCC, Dkt. No. 36. Over the objection of Petitioner’s former counsel, Jennifer Wellman, the
7 Court found that, for the purpose of sentencing considerations, the drugs Petitioner sold J.M.
8 caused his death. *See Campbell*, CR17-0025-JCC, Dkt. No. 37; (*See also* Dkt. No. 16-3 at 26.)
9 Following his sentencing, Petitioner filed a notice of appeal in the Ninth Circuit. *Campbell*,
10 CR17-0025-JCC, Dkt. No. 41. The grounds for Petitioner’s appeal are not known to the Court.
11 Petitioner was subsequently granted a substitution of counsel by the Ninth Circuit, and attorney
12 Eric Levin took over Petitioner’s case. *Campbell*, CR17-0025-JCC, Dkt. No. 45. Subsequently,
13 Petitioner voluntarily withdrew his appeal, and the same day filed a motion to withdraw his
14 guilty plea in this Court, which was denied. *Campbell*, CR17-0025-JCC, Dkt. Nos. 50, 54.
15 Petitioner now brings what the Court considers to be his first petition for habeas corpus relief.
16 (Dkt. No. 14.)

17 **II. DISCUSSION**

18 **A. Legal Standard**

19 To state a cognizable claim under 28 U.S.C. § 2255, a petitioner must assert that he or
20 she is in custody in violation of the Constitution or laws of the United States, that the district
21 court lacked jurisdiction, that the sentence exceeded the maximum allowed by law, or that the
22 sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). “Unless the motion and
23 the files and records of the case conclusively show that the prisoner is entitled to no relief, the
24 court shall grant a prompt hearing thereon.” 28 U.S.C. § 2255(b). A claim must be “so palpably
25 incredible or patently frivolous as to warrant summary dismissal” in order to justify the refusal of
26 an evidentiary hearing. *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (quoting

1 *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). Plaintiff alleges three separate
2 grounds for relief: (1) Petitioner’s plea was not intelligently entered into because he was coerced
3 into the plea by Ms. Wellman’s failure to investigate the cause of J.M.’s death; (2) Mr. Levin
4 rendered ineffective assistance of counsel by withdrawing Petitioner’s appeal to the Ninth
5 Circuit; and (3) the conditions of his supervised release are unconstitutionally vague and
6 overbroad.

7 **B. Knowing and Intelligent Plea**

8 Petitioner asserts that he did not enter into his plea intelligently because he was coerced
9 into entering into the plea. (Dkt. No. 14 at 4.) Petitioner alleges that this coercion was based on
10 Ms. Wellman’s inadequate assistance of counsel because of her failure to conduct an adequate
11 investigation into J.M.’s cause of death. (*Id.*) A plea is not entered into intelligently “if the
12 defendant is without the information necessary to assess intelligently the advantages and
13 disadvantages of a trial as compared with those attending a plea of guilty.” *United States v.*
14 *Hernandez*, 203 F.3d 614, 619 (9th Cir. 2000).

15 However, Petitioner was given substantial information regarding J.M.’s death when
16 deciding whether to enter into a plea agreement. Ms. Wellman hired an expert pathologist to
17 independently review the circumstances of J.M.’s death. *Campbell*, CR17-0025-JCC, Dkt. No.
18 29 at 19–24. This expert explicitly mentioned the chain of custody concern that Petitioner
19 mentions in his petition. (*Id.* at 20–21.) Petitioner also had access to J.M.’s autopsy records,
20 toxicology reports, and the findings of other experts who conducted an examination into J.M.’s
21 death. See *Campbell*, CR17-0025-JCC, Dkt. Nos. 28, 29. Petitioner had the necessary
22 information to assess the strengths and weaknesses of the Government’s case for proving that the
23 drugs Petitioner sold J.M. caused J.M.’s death. With this information, Petitioner ultimately
24 decided to enter into a plea agreement to avoid being charged with the sentencing enhancement
25 that his sale of drugs to J.M. caused J.M.’s death. *Campbell*, CR17-0025-JCC, Dkt. No. 9. When
26 asked at his plea hearing whether he had entered into his plea agreement intelligently, Petitioner

1 answered that he did. (Dkt. No. 16-2 at 19.) When asked at his plea hearing whether he had the
2 information necessary to intelligently enter into his plea, Petitioner answered that he did. (*Id.* at
3 18–19.) And when asked if he had an additional questions for Ms. Wellman or any need for
4 additional information, he answered that he did not. (*Id.*) For these reasons, the Court finds that
5 Petitioner’s plea was entered intelligently, and DENIES Petitioner’s motion for relief on this
6 ground.

7 **C. Ineffective Assistance of Counsel**

8 *1. Ineffective assistance of trial counsel*

9 Though Petitioner characterizes his first ground for relief as unintelligently entering into
10 his plea, the Court also analyzes Petitioner’s claim as one for ineffective assistance of counsel.
11 (*See* Dkt. No. 14.) Petitioner claims that Ms. Wellman provided ineffective assistance of counsel
12 by failing to fully investigate the cause of J.M.’s death. (*Id.* at 4.) In order to show ineffective
13 assistance of counsel, Petitioner must prove that: (1) counsel’s performance was professionally
14 unreasonable, and (2) any “deficienc[y] in counsel’s performance [was] prejudicial to the
15 defense.” *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984).

16 Petitioner fails to meet both prongs of the *Strickland* test. Petitioner alleges that Ms.
17 Wellman conducted an inadequate investigation in order to show that Petitioner was not
18 responsible for the death of J.M. (Dkt. No. 14 at 4.) But the plea agreement that Ms. Wellman
19 negotiated on behalf of Petitioner includes the express provision that the Government would
20 forego charging Petitioner for the death of J.M. *Campbell*, CR17-0025-JCC, Dkt. No. 9 at 3–4. A
21 conviction for distribution of controlled substance with the sentencing enhancements of a prior
22 conviction and death or great bodily injury would have resulted in a 360-month mandatory
23 minimum sentence. 21 U.S.C. § 841(b)(1)(C). Instead, the Government agreed to seek a sentence
24 of no greater than 120 months. *Campbell*, CR17-0025-JCC, Dkt. No. 9 at 7. Had Petitioner
25 rejected the plea deal that Ms. Wellman negotiated, the Government would have been free to
26 pursue all applicable sentencing enhancements at trial. *Id.* For these reasons, the Court finds that

1 Ms. Wellman's investigation into J.M.'s death and subsequent ability to negotiate a plea deal in
2 which the Government agreed not to charge Petitioner with causing the death of J.M. was not
3 professionally unreasonable.

4 Petitioner further fails to show that he suffered any prejudice from Ms. Wellman's
5 alleged failure to investigate the chain of custody. Petitioner received a sentence of six years,
6 well below the sentencing guideline range for his offense score, and less than a third of the 20-
7 year mandatory minimum he could have faced. *See Campbell*, CR17-0025-JCC, Dkt. No. 36.
8 Petitioner has provided no evidence to support an allegation that Petitioner would have received
9 a lighter sentence if Ms. Wellman had questioned the samples' chain of custody more forcefully
10 then she already did. For these reasons, Petitioner's motion for relief on this ground is DENIED.

11 2. *Ineffective assistance of appellate counsel.*

12 Petitioner argues that Mr. Levin rendered ineffective assistance of counsel by
13 withdrawing Petitioner's notice of appeal to the Ninth Circuit. (Dkt. No. 14 at 5.) Petitioner
14 argues that Mr. Levin's failure to pursue an appeal that Defendant would otherwise have pursued
15 is presumptively prejudicial. *See Roe v. Flores-Ortega*, 528 U.S. 470, 471–72 (2000); *see also*
16 *Garza v. Idaho*, 139 S.Ct. 738, 742 (2019). In *Garza*, the Court held that even if the defendant
17 has waived his right to appeal on most grounds, the defendant need not present meritorious
18 grounds for appeal in order to allege ineffective assistance of counsel for preventing the
19 Petitioner from filing a notice of appeal. *Id.*

20 But the cases Petitioner cites are distinguishable from his own. Ms. Wellman did file a
21 notice of appeal with the Ninth Circuit. *Campbell*, CR17-0025-JCC, Dkt. No. 41. After
22 substitution, Mr. Levin maintained the appeal until voluntary dismissal. *Campbell*, CR17-0025-
23 JCC, Dkt. No. 55. Petitioner signed the motion to withdraw, consenting to the appeal's voluntary
24 dismissal. *Campbell*, CR17-0025-JCC, Dkt. No. 54 at 2. Petitioner chose to file a *pro se* motion
25 to withdraw his guilty plea with this Court the same day he chose to voluntarily dismiss his
26 notice of appeal. *Campbell*, CR17-0025-JCC, Dkt. Nos. 51, 54. Mr. Levin's advice, likely based

1 on the appeal waiver, that Petitioner should withdraw his appeal, and Petitioner's subsequent
2 decision to follow that advice, is not the same as Mr. Levin preventing Petitioner from filing an
3 appeal. *See Roe*, 528 U.S. at 471–72; *see also Garza*, 139 S.Ct. at 742. Mr. Levin's advice to
4 withdraw the notice of appeal is not presumptively prejudicial.

5 Nor were Mr. Levin's actions professionally unreasonable under *Strickland*. *See*
6 *Strickland*, 466 U.S. at 691–92. Petitioner was barred from directly appealing his sentence, fine,
7 restitution order, probation or supervised release conditions, and forfeiture order by the terms of
8 the plea agreement. *See Campbell*, CR17-0025-JCC, Dkt. No. 9. Though the grounds for
9 Petitioner's appeal are unknown, appeal on any grounds barred by the plea agreement could be
10 cause for rescission of the plea agreement, and could lead the Government to re-charge
11 Petitioner, including with the great bodily injury or death sentencing enhancement he had
12 successfully avoided through his plea deal. *Id.* Mr. Levin's advice to withdraw the notice of
13 appeal in light of the appeal waiver is not professionally unreasonable. And, Petitioner cannot
14 show prejudice under the second prong of *Strickland*. *See Strickland*, 466 U.S. at 691–92.
15 Petitioner has not articulated any basis for appeal, nor has he demonstrated how such an appeal
16 would not be precluded by the plea agreement. (*See* Dkt. No. 14.) He has also not shown that he
17 was entitled to relief by the Ninth Circuit. For these reasons, the Court finds that Mr. Levin did
18 not render ineffective assistance of counsel, and DENIES Petitioner's motion for relief on this
19 ground.

20 **D. Conditions of Supervised Release**

21 Petitioner asserts that the conditions of his supervised release are unconstitutionally
22 overbroad and vague, and that Petitioner did not receive notice of the conditions in time to object
23 to them. (Dkt. No. 14 at 7.) The special conditions of supervised release that the Government
24 sought to impose were contained in the report of probation services, which was circulated to the
25 parties two weeks before the sentencing hearing. (*See* Dkt. No. 16 at 33); *Campbell*, CR17-0025-
26 JCC, Dkt. No. 20 at 2. The standard conditions the Government sought to impose were contained

1 in the proposed judgment and sent to defense counsel two weeks before the sentencing hearing.
2 (Dkt. Nos. 18-1, 18-2.) At the sentencing hearing, Petitioner was asked if he had received, and
3 had an opportunity to read and comment on, the report produced by probation. (Dkt. No. 16-3 at
4 3.) Ms. Wellman stated that he had. (*Id.*) Neither Ms. Wellman nor Petitioner objected to the
5 supervised release conditions at sentencing. (*See* Dkt. No. 16-3.) Therefore, the Court finds that
6 Petitioner did have adequate time to review and object to the proposed conditions of supervised
7 release.

8 Further, Petitioner has waived any right to bring a collateral attack against the conviction
9 and sentence imposed, except as it may relate to the effectiveness of legal representation.
10 *Campbell*, CR17-0025-JCC, Dkt. No. 9. Petitioner has not asserted that the imposition of the
11 conditions of supervised release were imposed as a result of ineffective assistance of counsel.
12 (*See* Dkt. No. 14.) Petitioner instead argues that despite such waiver, he may challenge a
13 condition of supervised release as a violation of due process on the grounds of unconstitutional
14 vagueness. *See United States v. Adkins*, 743 F.3d 176, 192 (7th Cir. 2014); *see also United States*
15 *v. Soltero*, 510 F.3d 858, 865–66 (9th Cir. 2007).

16 “A [condition of supervised release] violates due process of law if it either forbids or
17 requires the doing of an act in terms so vague that men of common intelligence must necessarily
18 guess at its meaning and differ as to its application.” *United States v. Hug*, 384 F.3d 762, 768
19 (9th Cir. 2004). Though Petitioner alleges that several conditions of supervised release are
20 invalid on constitutional grounds, Petitioner does not allege that any of the conditions are
21 unconstitutionally vague. (*See* Dkt. Nos. 14, 14-1.) Petitioner also does not allege that he or a
22 reasonable individual must guess as to whether conduct is prohibited by the probation conditions.
23 (*See id.*) Petitioner’s claims on other constitutional grounds are therefore barred by the terms of
24 the plea agreement. *See Adkins*, 743 F.3d at 176 (“Nor is there a general constitutional-argument
25 exception to waivers in plea agreements . . . Thus, it remains generally unproblematic to
26 knowingly waive a constitutional right or to lose a constitutional right.”).

III. CONCLUSION

For the foregoing reasons, Petitioner's motion for habeas corpus relief (Dkt. No. 14) is DENIED.

DATED this 18th day of July 2019.

Joh C Cogburn

John C. Coughenour
UNITED STATES DISTRICT JUDGE